93-64

No. _____

Supreme Court, U.S.
FILED
JUN 24 1993
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**In The Supreme Court of the United States**

**OCTOBER TERM, 1992**

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**Bano Bi, Individually and on Behalf of the Children of Rashid Kahn, and as Representative of the Estate of Rashid Kahn, et al.,**

Petitioners

against

**UNION CARBIDE CHEMICALS AND PLASTICS COMPANY INC., et al,** Respondents

**Abdul WAHID, et al.,** Petitioners

against

**UNION CARBIDE CHEMICALS AND PLASTICS COMPANY INC., et al.,** Respondents

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# APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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## TABLE OF CONTENTS

## APPENDIX

PAGE

Appendix A---Opinion of Federal District Court Dated February 18, 1992 .....A1

Appendix A-1---Judgment of Federal District Court Dated February 23, 1992 .....A21

Appendix B---Opinion and Judgment of Court of Appeals Dated January 26, 1993 .....A24

Appendix C---Order of Court of Appeals Overruling Petition for Rehearing and Petition en banc Dated March 26, 1993 .....A47

Appendix D---Removal Petition of Union Carbide Defendants in Soni Dated February 4, 1985 .....A49

Appendix E---Removal Petition of Enserch Defendants in Soni Dated June 4, 1985 .....A59

Appendix F---First Order of Remand in Soni Dated February 20, 1985 .....A65

Appendix G---Second Order of Remand in Soni Dated June 27, 1985 .....A67

Appendix H---Affidavit of Adbul Jabbar Khan
Dated September 25, 1991 .....A69

Appendix I---Affidavit of Kim Laughlin
Dated August 14, 1991 .....A99

Appendix J---Affidavit of Kim Laughlin
Dated October 9, 1991 .....A135

Appendix K---The Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985
Dated March 29, 1985 .....A139

**APPENDIX A**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In re Union Carbide Corporation Gas Plant Disaster

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ABDUL WAHID, et al.,

Plaintiffs,

-against-

UNION CARBIDE CHEMICALS AND PLASTICS COMPANY, INC., formerly called Union Carbide Corporation, et al.,

Defendants.

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MDL Docket No. 626
OPINION AND ORDER

BANO BI, et al.,

Plaintiffs,

-against-

UNION CARBIDE CHEMICALS AND PLASTICS COMPANY, INC., formerly called Union Carbide Corporation, et al.,

Defendants.

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APPEARANCES:

For Abdul Wahid Plaintiffs:

Bailey and Williams
Dallas, Texas
Of Counsel: James A. Williams, Esq.

James P. Frantz & Associates
San Diego, California

For Bano Bi Plaintiffs:

Wayne Walker, Esq.
Houston, Texas

For Defendant Union Carbide Chemicals
and Plastics Company

Kelley, Drye & Warren
New York, New York
Of Counsel: Bud G. Holman, Esq.
Jeffrey S. Cook, Esq.
Lisa E. Cleary, Esq.

JOHN F. KEENAN, United States District Judge

JOHN F. KEENAN, United States District Judge:

Before the Court are motions brought by defendant Union Carbide Chemical and Plastics Company Inc. ("Union Carbide"), formerly known as Union Carbide Corporation. These actions arise out of the tragic industrial accident at Bhopal, India on the night of December 2-3, 1984 in which thousands of people died. Union Carbide moves pursuant to Rule 12(b) of the Federal Rules of Civil Procedure for an order dismissing plaintiffs' complaints. Union Carbide moves in the alternative for an order pursuant to Rule 56(b) of the Federal Rules of Civil Procedure granting summary judgment. Plaintiffs move for reconsideration of two rulings by a Texas federal court, one refusing to remand these actions to a state court in Texas, and another dismissing certain defendants.

Plaintiffs initially requested and were granted oral argument. After the Court scheduled oral argument, plaintiffs withdrew their request.

For the reasons discussed below, the Court declines to reach the merits of defendants' motions. Instead, the Court dismisses these actions on the grounds of forum non conveniens. Plaintiffs' motions are denied.

## Procedural History

The Bhopal incident has been the subject of previous litigation and decisions by this Court. On May 12, 1986, this court dismissed actions consolidated before it by the United States Judicial Panel on Multidistrict Litigation. That dismissal was based on the doctrine of forum non conveniens. In re Union Carbide Corp. Gas

Plant Disaster, 634 F. Supp. 842 (S.D.N.Y. 1986). In finding that India was a more appropriate forum and deferring to the Indian judicial system, the Court stated that

> [t]he presence in India of the overwhelming majority of the witnesses and evidence, both documentary and real, would by itself suggest that India is the most convenient forum for this consolidated case. The additional presence in India of all but the less than handful of claimants underscores the convenience of holding trial in India.
>
> . . .
>
> In the Court's view, to retain the litigation in this forum, as plaintiffs request, would be yet another example of imperialism, another situation in which an established sovereign inflicted its rules, its standards and values on a developing nation. The Court declines to play such a role.

Id. at 866-67.

In 1987, the United States Court of Appeals for the Second Circuit modified and

affirmed this Court's dismissal on forum non conveniens grounds. In re Union Carbide Corp. Gas Plant Disaster, 809 F.2d 195 (2d Cir. 1987). In that opinion, the Second Circuit held that

> we are satisfied that there was no abuse of discretion in granting dismissal of the action [on forum non conveniens grounds]. On the contrary, it might reasonably be concluded that it would have been an abuse of discretion to deny a forum non conveniens dismissal.

Id. at 202.

The United States Supreme Court denied certiorari. Executive Committee Members, et al. v. Union of India and Union Carbide Corp., 484 U.S. 871 (1987).

On March 25, 1985 the Parliament of the Union of India enacted the Bhopal Act. That statute gave the Union of India the exclusive right to represent Indian citizens in connection with claims arising out of the

Bhopal disaster, including the right to commence or settle judicial proceedings. Holman Affidavit, Exhibit L, Bhopal Act at § 3. Based on this authority, the Union of India filed suit against Union Carbide in Bhopal District Court on September 5, 1986.

Litigation continued in India for more than two years. On February 14, 1989, the Supreme Court of India effectuated by Order a settlement of "all litigations, claims, rights, and liabilities related to and arising out of the [Bhopal] disaster." The Terms of Settlement were signed on February 15, 1989 by counsel for Union Carbide and Union Carbide India, Ltd. and by the Advocate on Record for the Union of India. Under the terms of the settlement, Union Carbide and Union Carbide India, Ltd. agreed to pay $470 million to the Registrar of the Supreme Court of India on or before March

23, 1989. On May 4, 1989, the Supreme Court of India set forth the reasons that had persuaded it that the settlement was "just and reasonable". Holman Affidavit, Exhibit T.

On December 22, 1989 the Supreme Court of India upheld that constitutional validity of the Bhopal Act. The Court confirmed the exclusive authority of the Union of India to settle all claims that could be made against Union Carbide or Union Carbide India, Ltd. arising out of the Bhopal disaster. Charan Lal Sahu v. Union of India, 1989 (Suppl.) Scale 1 (Supreme Court of India) at 97, Holman Affidavit Exhibit U.

Plaintiffs filed these actions in Texas state courts in October, 1990.[1] Defendants

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[1] One of the actions, entitled Abdul Wahid, et al. v. Union Carbide Chemicals and Plastics Company, Inc., formerly called the Union Carbide Corporation, and Union Carbide India, Ltd., was filed in the 288th Judicial

removed both of the actions to federal district courts in Texas in November 1990. On January 30, 1991, over the opposition of plaintiffs' attorneys, the United States Judicial Panel on Multidistrict Litigation transferred both actions to the Southern District of New York, where the actions were assigned to this Court.

Discussion

Defendants move pursuant to Fed. R. Civ. P. 12(b)(6) for an order dismissing plaintiff's complaints on the ground that they fail to state a claim. In the alternative, defendants move pursuant to

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Court of Bexar County, Texas. The second action, entitled Bano Bi, et al. v. Union Carbide Corporation, Union Carbide of India, Ltd., Union Carbide Eastern, Inc., Enserch Corporation, Humphreys & Glasgow Consultants, Ltd., Humphreys & Glasgow, Ltd., and Ebasco-Humphreys & Glasgow, Inc., was filed in the 58th Judicial District Court of Jefferson County, Texas.

Fed. R. Civ. P. 56 for an order granting summary judgment in their favor on the complaints.

Defendants advance several arguments in support of their motion for summary judgment, arguing that such relief is warranted

> on the grounds that: 1) an accord and satisfaction has arisen in law and there has been a compromise, settlement and release of these claims, barring this litigation; 2) under the doctrine of res judicata, plaintiffs are bound by the settlement agreement entered into by the Union of India, Union Carbide, and Union Carbide of India Limited and the subsequent Orders entered by the Supreme Court of India, which settled and disposed of these claims arising from the Bhopal tragedy; 3) under the doctrine of collateral estoppel, plaintiffs are bound by the previous decision of this Court dismissing all actions pending under MDL 626 on the ground of forum non conveniens; 4) plaintiff's claims are barred on statute of limitations grounds; 5) plaintiffs' claims are barred on laches grounds; and

> 6) plaintiffs and their attorneys lack standing and authority to maintain these actions in light of the Supreme Court of India's rulings with respect to the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985.

Defendant's Notice of Motion at 2.

In opposing defendants' motions, plaintiffs advance a thicket of arguments, some of which would be labeled imaginative by a kind or charitable observer. The Bano Bi plaintiffs argue that the Court should reconsider rulings made by District Judge Joe Fisher of the Eastern District of Texas who dismissed certain defendants and who denied a motion by plaintiff to remand one of the actions to state court. The defendants oppose summary judgment on accord and satisfaction grounds by attacking the fairness, propriety and constitutionality of the Bhopal Act and the settlement between defendants and the Union of India. In

response to defendants' argument that plaintiffs are collaterally estopped from relitigating the issues resolved by this Court's 1986 forum non conveniens dismissal, plaintiffs insist that the Court is bound to apply the forum non conveniens law of the state of Texas.

The Court declines to reach the merits of defendants' motions for dismissal for failure to state a claim for summary judgment. In 1986, the Court declined to exercise jurisdiction, applying the standards and weighing the factors suggested by the Supreme Court in Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 955 (1947), and Piper Aircraft Co. v. Reyno, 454 U.S. 235, 102 S.Ct. 252, 70 L. Ed.2d 419 (1981). At that time, this Court held clearly that the aftermath of the Bhopal disaster should be resolved in Indian

courts. In 1987, the Court of Appeals for the Second Circuit held not only that this Court had correctly refused to exercise jurisdiction, but added that "it might reasonably be concluded that it would have been an abuse of discretion to deny a forum non conveniens dismissal." In re Union Carbide Gas Plant Disaster, supra, 809 F.2d at 202. Ruling on the substantive issues raised in these motions would require the Court to exercise jurisdiction over the actions. That course would be inconsistent with the earlier rulings of this Court and of the Second Circuit.

Forum Non Conveniens

Plaintiffs' arguments concerning forum non conveniens are easily disposed of. The Court rejects plaintiffs' argument that Texas forum non conveniens law applies to

this action. Abdul Wahid Memorandum at 6-7; Bano Bi Memorandum at 87-91. As it did in 1986, this Court will apply federal forum non conveniens law to the issue of the convenience of this forum. In re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982, 821 F.2d 1147, 1159 (5th Cir. 1987)(en banc) ("We therefore hold that a federal court sitting in a diversity action is required to apply the federal law of forum non conveniens when addressing motions to dismiss a plaintiff's case to a foreign forum"), vacated sub nom., Pan Am World Airways Inc. v. Lopez, 490 U.S. 1032, aff'd in relevant part and vacated in part, 883 F.2d 17 (5th Cir. 1989); Rudetsky v. O'Dowd, 660 F. Supp. 341 (E.D.N.Y. 1987)(applying federal forum non conveniens law); Fiorenza v. U.S. Steel Int'l Ltd. 311 F. Supp. 117, 119 (S.D.N.Y. 1969) (forum non conveniens is

a procedural analysis that is governed by federal rather than state law).

Plaintiffs argue that the forum non conveniens analysis in this case must have a different outcome based on what has transpired in the litigation since this Court's dismissal in 1986. The Court will address those arguments below, but notes here that they are all rejected. In 1986, the Court engaged in an exhaustive analysis of the forum non conveniens factors and standards, and applied them to the facts of this case. The Court adopts here the analysis of forum non conveniens in its 1986 opinion. Despite plaintiffs' arguments, both the analysis of the forum non conveniens factors and the result of that analysis are the same today as in 1986. A review of the factors considered by the Court in its 1986 dismissal makes it

apparent that plaintiffs' position is without merit.

Plaintiffs contend that the course of the case in India over the last six years "makes it plain and clear that India is not an adequate alternative forum." Bano Bi Memorandum at 92. They contend that the inadequacy of the Indian forum has been confirmed by the "inadequate" settlement and the allegedly unfair and coercive means by which that settlement was reached. The policies and procedures of the Indian government and judiciary are certainly different from those of American institutions. For substantially the reasons set forth in its 1986 decision, however, the Court concludes once again that India is an adequate forum for this action. In re Union Carbide, supra, 643 F. Supp. 847. The fact that plaintiffs in this action perceive the

settlement to be inadequate does not change the Court's conclusion. The litigation in India, the procedures for notice and the settlement of the case were supervised and administered by the Indian judiciary and Parliament. The constitutionality of the Bhopal Act was upheld by the Supreme Court of India. It is not the role of this Court to conduct appellate review of the acts of the Indian judiciary and Parliament. Cf. In Re Union Carbide, 634 F. Supp. at 867.

The Court also rejects plaintiffs' argument that the result of the forum non conveniens analysis is changed because the plaintiffs are willing to enter into stipulations regarding the use of American expert witnesses, pay the costs of defendants' overseas depositions, and pay for plaintiffs to travel to this country for depositions and medical examinations. Bano

Bi Memorandum at 94. In the Court's view, in spite of those stipulations, the private interest concerns discussed in Gilbert still weigh strongly in favor of dismissal. Those offered stipulations, of course, have no impact upon the Court's 1986 discussion of the public interest factors raised in Gilbert.

Plaintiffs' Motions

On January 2, 1991, after this case was removed from Texas state court, Judge Fisher denied plaintiffs' motion to remand the Bano Bi action to the state court. Holman Affidavit, Ex. I. Plaintiffs now ask this Court to "reconsider" Judge Fisher's order. As this Court stated at a conference with counsel April 8, 1991, the Court declines to modify Judge Fisher's order in any fashion. The Abdul Wahid plaintiffs have also moved

before this Court for remand to state court in Texas. Both of those motions are denied.

Plaintiffs have also moved for reconsideration of Judge Fisher's December 5, 1990 dismissal of Enserch Corporation, Humphreys and Glasgow, Inc., Humphreys & Glasgow, Ltd., and Humphreys & Glasgow Consultants Pvt. Ltd. Those defendants were named in the state court actions. Plaintiffs' motion is denied.

## Conclusion

For the reasons discussed above, these actions are dismissed. Plaintiffs' motions are denied. These actions are ordered removed from the active docket of this Court.

SO ORDERED.

Dated: New York, New York
February 18, 1992

s/
JOHN F. KEENAN
United Stated District Judge

**APPENDIX A-1**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In re Union Carbide Corporation Gas Plant Disaster

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MDL Docket No. 626
M 21-38 (JFK)
JUDGMENT

ABDUL WAHID, et al.,

Plaintiffs,

-against-

UNION CARBIDE CHEMICALS AND PLASTICS COMPANY, INC., formerly called Union Carbide Corporation, et al.,

Defendants.

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BANO BI, et al.,

Plaintiffs,

-against-

UNION CARBIDE CHEMICALS AND PLASTICS COMPANY, INC., formerly called Union Carbide Corporation, et al.,

Defendants.

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Defendant Union Carbide Chemical and

Plastics Company Inc. having moved to dismiss plaintiff's complaint pursuant to Rule 12(b)(6), F.R.Civ.P., or, in the alternative, for summary judgment, pursuant to Rule 56, F.R.Civ.P., plaintiffs having moved for reconsideration of two rulings by a Texas federal court, one refusing to remand these actions to a state court in Texas, and another dismissing certain defendants, and the said motions having come before the Honorable JOHN F. KEENAN, U.S.D.J., and the Court thereafter on February 13, 1992, having rendered its opinion and order (#69359); denying plaintiffs' motions, and the Court declining to reach the merits of defendants' motions, instead, dismissing these actions on the grounds of forum non conveniens, and removing these actions from the active docket of the Court, it is,

ORDERED, ADJUDGED AND DECREED: That plaintiffs' motions be and they are hereby denied, and it is further,

ORDERED, that these actions be and they are hereby dismissed on the grounds of forum non conveniens. The Court declines to reach the merits of defendant's motions, for the reasons discussed in the Court's Opinion and Order, dated February 18, 1992, and it is further,

ORDERED, that these actions be and they are hereby removed from the active docket of the Court.

DATED: NEW YORK, NEW YORK
February 23, 1992

s/
Clerk

**APPENDIX B**

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 253, 254 -- August Term 1992

Argued: November 10, 1992
Decided: January 26, 1993

Docket Nos. 92-7325, 92-7327

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BANO BI, INDIVIDUALLY AND ON BEHALF OF THE CHILDREN OF RASHID KAHN, AND AS REPRESENTATIVE OF THE ESTATE OF RASHID KAHN, ET AL.,
Plaintiffs-Appellants,

v.

UNION CARBIDE CHEMICALS AND PLASTICS COMPANY, INC., ET AL.,
Defendants-Appellants.

- - - - - - - - - - - - - - - - - - - - - - - -

ABDUL WAHID, ET AL.,
Plaintiffs-Appellants,

v.

UNION CARBIDE CHEMICALS AND PLASTICS COMPANY, INC., ET AL.,
Defendants-Appellees.

- - - - - - - - - - - - - - - - - - - - - - - -

Before: NEWMAN, CARDAMONE and MAHONEY,

Circuit Judges.

Appeal from the March 4, 1992, judgment of the United States District Court for the Southern District of New York (John F. Keenan, Judge) dismissing two class action complaints arising from the Bhopal disaster. Affirmed.

Benton Musslewhite, Houston, TX, for plaintiffs-appellants.

Bud G. Holman, New York, N.Y. (Jeffrey S. Cook, Lisa E. Cleary, Kelley Drye & Warren, New York, N.Y., on the brief), for Defendant-appellee Union Carbide Chemicals & Plastics Co. Inc.

(E.R. Norwood, C. Clint Adams, Taylor & Norwood, Liberty, Tex., submitted a brief for defendants-appellees Enserch Corp., Humphreys & Glasgow Consultants Pvt., Ltd., Humphreys & Glasgow, Ltd., & Ebasco-Humphreys & Glasgow, Inc.)

JON O. NEWMAN, Circuit Judge:

This appeal presents an interesting issue of comity among nations in the resolution of claims arising from torts

occurring within a foreign country. The precise issue is whether the federal and state courts of this country should defer to the judgment of a democratic foreign government that disputes arising from a mass tort occurring within its borders can be best resolved by according the foreign government exclusive standing to represent the victims of the disaster in the courts of the world. This question arises on an appeal by a class of tort victims from the March 4, 1992, judgment of the District Court for the Southern District of New York (John F. Keenan, Judge) dismissing two complaints on the ground of forum non conveniens. We conclude that the plaintiffs lack standing and on that ground affirm.

Background

On the night of December 2, 1984, the most devastating industrial disaster in

history occurred when winds blew deadly gas from a plant operated by Union Carbide India Limited ("UCIL") into densely populated parts of Bhopal, India. On January 2, 1985, the Judicial Panel on Multidistrict Litigation assigned some 145 purported class actions filed in federal district courts across the United States to the Southern District of New York, where they became the subject of a consolidated complaint filed on June 28, 1985 before Judge Keenan. On March 29, 1985, India enacted the Bhopal Gas Leak Disaster (Processing of Claims) Act ("the Bhopal Act" or "the Act") granting to its government, the Union of India (referred to hereafter as "the Indian Government"), the exclusive right to represent the victims of the disaster in India or elsewhere. Pursuant to this authority, on April 8, 1985, the Indian Government filed a

complaint in the Southern District of New York on behalf of all the victims of the Bhopal disaster. The Indian Government's decision to bring suit in the United States was attributed to the fact that the Indian courts did not have jurisdiction over Union Carbide Corporation ("Union Carbide"),[1] UCIL's parent company.

In a thoroughly reasoned opinion, Judge Keenan granted Union Carbide's motion to dismiss the cases before him on the ground of forum non conveniens over the objections of the Indian Government and the individual plaintiffs. See In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December 1984, 634 F. Supp. 842 (S.D.N.Y. 1986). Judge Keenan conditioned his dismissal on, among other things, Union

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[1] Union Carbide has since changed its name to Union Carbide Chemicals and Plastics Company Inc.

Carbide's consent to the jurisdiction of the courts of India. We affirmed the District Court's decision after modifying it in a manner not relevant to the pending appeal. See In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December 1984, 809 F.2d 195 (2d Cir.), cert. denied, 484 U.S. 871 (1987).

In September 1986, the Indian Government, acting pursuant to its authority under the Bhopal Act, brought suit on behalf of all claimants in the District Court of Bhopal. The litigation continued in India for more than two years. By orders dated February 14 and 15, 1989, the Supreme Court of India approved a settlement of "all litigations, claims, rights and liabilities related to and arising out of the [Bhopal] disaster." Union Carbide Corp. v. Union of India, 1989 [Supplement] S.C.A.L.E. 89, 90.

Under the settlement, Union Carbide and UCIL agreed to pay $470 million to the Indian Government for the benefit of all victims of the Bhopal disaster. See id. at 91. On May 4, 1989, the Supreme Court of India set forth its reasons for concluding that the settlement was just and reasonable. See Union Carbide Corp. v. Union of India, 1989 [Supplement] S.C.A.L.E. 97. The Court was concerned primarily that the victims of the disaster receive immediate relief. See Id. at 105-06. On December 22, 1989, in a related decision, the Court upheld the constitutional validity of the Bhopal Act and confirmed the Indian Government's exclusive authority to compromise all claims arising out of the Bhopal disaster. See Charan Lal Sahu v. Union of India, 1989 [Supplement] S.C.A.L.E. 1.

After settlement of the Indian lawsuit,

two class actions were filed in Texas state courts in October 1990 seeking compensation for injuries caused by the Bhopal disaster. In one action, Abdul Wahid, as class representative, filed a suit against Union Carbide and UCIL. In the other action, Bano Bi, as class representative, filed a suit against Union Carbide, UCIL, Union Carbide Eastern, Inc., Enserch Corporation, Humphreys & Glasgow Consultants Pvt., Ltd., Humphreys & Glasgow, Ltd., and Ebasco-Humphreys & Glasgow, Inc. These class representatives, appellants on this appeal, contend that their collateral attack on the settlement of their claims by the Indian Government is proper because, among other things, the Indian Government had an unacceptable conflict of interest as part owner of UCIL, most of the victims oppose the settlement as grossly inadequate, and

their due process rights were violated because they received inadequate notice and inadequate representation in the proceedings and because they could not opt out of the settlement.

Appellees removed these actions to two Texas federal district courts in November 1990. In the Bi action, Judge Fisher, of the Eastern District of Texas, dismissed as defendants Enserch Corporation, Humphreys & Glasgow Consultants Pvt., Ltd, Humphreys & Glasgow, Ltd., and Ebasco-Humphreys & Glasgow, Inc. He also denied Bi's motion to remand that action to the Texas state court. On January 30, 1991, the Judicial Panel on Multidistrict Litigation transferred these two actions to the Southern District of New York before Judge Keenan. Judge Keenan refused to reconsider Judge Fisher's rulings and denied Wahid's motion to remand his

action to the Texas state court. Applying federal forum non conveniens law, Judge Keenan dismissed both actions; he held that the analysis and the results of his 1986 opinion were still appropriate.

Discussion

This appeal presents an extraordinary collection of issues, but we have concluded that we need reach only the threshold issue of plaintiffs' standing to dispose of the appeal.[2] That issue is whether the

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[2] Our preference to discuss only the threshold issue of standing will be best understood by identifying the array of complex issues in this case that we need not reach. They are:

1. Whether the claim against the in-state defendants was so spurious on the merits that it was fraudulent for the plaintiffs to join them as defendants?

2. Whether the alien defendants, UCIL, Humphreys & Glasgow Consultants Pvt., Ltd., and Humphreys & Glasgow, Ltd., are amenable to long-arm service in Texas because of their contacts with Texas?

3. Whether the alien defendants were properly joined by asserting jurisdiction over their parent corporations?

4. Whether defendant Union Carbide Eastern, Inc., a Delaware Corporation with its principal place of business in Hong Kong, is considered an alien for purposes of diversity jurisdiction?

5. Whether removal of the state court actions was improper if the in-state defendants were properly joined?

6. Whether removal of the state court actions was improper if aliens were both plaintiffs and defendants?

7. Whether defendant is collaterally estopped to deny that removal was improper because of a remand ruling in a prior District Court suit in Texas?

8. Whether forum non conveniens is a matter of federal or state law?

9. Whether dismissal on forum non conveniens grounds was proper?

10. Whether, if removal was proper and forum non conveniens is a matter of federal law, a federal court, dismissing a suit on forum non conveniens grounds, should remand to state court, or dismiss because the removing parties are entitled to the benefit of the federal court forum non conveniens ruling, despite conflicting state law?

plaintiffs have standing to maintain this action in the courts of this country despite the Bhopal Act's delegation to the Indian Government of the exclusive right to represent those injured in the Bhopal disaster.

India passed the Bhopal Act to "secure that claims arising out of, or connected with, the Bhopal gas leak disaster are dealt with speedily, effectively, equitable and to the best advantage of the claimants."

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11. Whether the actions are barred by collateral estoppel arising from our 1987 ruling dismissing the earlier Bhopal action on forum non conveniens grounds?

12. Whether the actions are barred by accord and satisfaction, compromise and settlement, release, res judicata, merger and bar, or statute of limitations defenses?

Though the reader is entitled to wonder if these issues were thought up by a group of professors formulating final exams in federal jurisdiction and civil procedure, they are actually presented in this one appeal.

Preamble to the Bhopal Act. To effectuate the swift and just resolution of claims, section 3 of the Act delegates to the Indian Government "the exclusive right to, represent, and act in place of (whether within or outside India) every person who has made, or is entitled to make, a claim for all purposes connected with such claim in the same manner and to the same effect as such person." This delegation includes the right to institute or withdraw a suit and to enter into a compromise. Section 3 also provides that, in cases pending as of the effective date of the Act in courts outside of India, the Indian Government would "represent, and act in place of, or along with, such claimant, if such court or other authority to permits." Section 4 of the Act permits individual claimants a limited right to participate in the proceedings. Section

4 states that the Indian Government "shall have due regard to any matters which such person may require to be urged with respect to his claim and shall, if such person so desires, permit at the expense of such person, a legal practitioner of his choice to be associated in the conduct of any suit or other proceeding relating to his claim."

The Supreme Court of India, in a lengthy opinion, concluded that the Bhopal Act was constitutional under the Indian Constitution and that the Act violated no principles of natural justice. In so ruling, the Indian Court rejected many of the same arguments that appellants urge in this Court. The Indian Court held that the Indian Government's exclusive representation of all victims in its sovereign capacity would be constitutional as long as the Indian Government assumes the obligation to

pay the victims interim relief or maintenance until monies are realized from Union Carbide, because the Indian Government's exclusive representation deprived the victims of their right to seek immediate relief from Union Carbide themselves. See Charan Lal Sahu, 1989 [Supplement] S.C.A.L.E. at 53-54. The Court excused the Indian Government's failure to give notice of the settlement to each of the several hundred thousand claimants prior to approving the settlement. It reasoned that although the lack of notice may affect the appearance of justice, justice was in fact done because the arguments against settlement were adequately advocated by those who were aware of the settlement and argued against it. See id. at 63-65. In sum, the Court confirmed that as far as Indian law is concerned, the Bhopal Act's

grant of exclusive standing to the Indian Government was proper.

We are faced with what we believe is an issue of first impression. We must decide whether we will give effect to the statute of a foreign government that purports to grant that government exclusive standing to represent the victims of a mass tort that occurred within its borders. India is a democracy. Its Constitution, which took effect in 1950, provides for a republican form of parliamentary government and guarantees the fundamental rights of the people, including equal protection and procedural due process. See Chun-Chi Young, The Legal System of the Republic of India, in 9 Modern Legal Systems Cyclopedia 9.80.1, §§ 1.3(A), 1.3(B)(2)(b) (Kenneth R. Redden & Linda L. Schlueter eds., 1990). Its President is chosen for a five-year term by

an electoral college consisting of the elected members of the Parliament and the state legislatures. See id. at § 1.3(A)(1). The President selects the justices of the Supreme Court and other high courts. See id. The de facto executive is the Prime Minister, who is elected by the parliamentary members of the majority party. See id. The parliament consists of two houses: the Council of States, which consists of state representatives chosen primarily by the state assemblies along with 12 members nominated by the President, and the House of the People, which is directly elected. See id. at § 1.3(A)(2). Judicial independence is a basic principle of India's Constitution. See id. at § 1.3(B)(2)(d). The members of the Supreme Court are guaranteed tenure until age 65 and can be removed only for incompetence or misconduct

by a vote of a majority of all the members of each house and two-thirds of those voting. See id. at § 1.4(A).

India has chosen a system to deal efficiently with a problem of mass proportions that occurred within its borders. It decided in an act passed by its democratic parliament to represent exclusively all the victims in a suit against Union Carbide and to use the money it received in settlement of that suit to fund a plan framed, pursuant to the Bhopal Act, to process the claims of all the victims. Union Carbide's negotiations with the Indian Government were conducted under the assumption that the settlement amount covered all claims. To grant the victims of the Bhopal disaster, most of whom are citizens of India, access to our courts when India has set up what it believes to be the

most effective method of dealing with a difficult problem would frustrate India's efforts.

Under the act of state doctrine, we will not sit in "judgment on . . . acts of a governmental character done by a foreign state within its own territory and applicable there." See 1 Restatement (Third) of the Foreign Relations Law of the United States § 443 (1987). Although the act of state doctrine is not precisely applicable here, the concerns underlying it support our result. That doctrine has "'constitutional' underpinnings" and "arises out of the basic relationships between branches of government in a system of separation of powers." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964). Our Supreme Court was concerned that the Judicial Branch's "passing on the validity

of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere." Id. Here too, were we to pass judgment on the validity of India's response to a disaster that occurred within its borders, it would disrupt our relations with that country and frustrate the efforts of the international community to develop methods to deal with problems of this magnitude in the future.

It is not relevant to our determination whether, under our constitutional standards, our Government could pass an act similar to the Bhopal Act. We are deferring to the statute of a democratic country to resolve disputes created by a disaster of mass proportions that occurred within that country. Any challenge appellants may have

to the settlement must be made through the legislative or judicial channels that are available in India. We hold that when a recognized democracy determines that the interests of the victims of a mass tort that occurred within its borders will be best served if the foreign government exclusively represents the victims in courts around the world, we will not pass judgment on that determination, and we will permit only the foreign government access to our courts to litigate those claims, subject of course to our own requirements for standing. This conclusion is especially compelling in a case such as this where almost all of the victims are Indian citizens.

Since our resolution of the standing issue permits us to dispose of the appeal, the only remaining issue is whether we should affirm the judgment dismissing the

complaints or remand with directions to remand the suits to the Texas state court. Whether or not a remand would be appropriate if the state court were free to apply its own law of standing, in this case federal law applies. The question whether courts in our federal system must respect an act of a foreign country that purports to deprive the victims of a mass tort of standing to sue in our courts is a question of federal common law binding on state and federal courts alike. The considerations underlying this determination implicate the relationship between our nation and India and are uniquely federal in nature. See Sabbatino, 376 U.S. at 424-25. Furthermore, permitting individual states to develop rules to determine the Bhopal Act's effect on standing in their courts would frustrate the need for a uniform policy on matters of

foreign relations. See United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979).

Because the Texas state courts, applying federal common law, would be obliged to reach the same conclusion regarding appellants' lack of standing that we have reached, a remand would be pointless. We therefore affirm the District Court's judgment of dismissal.

**APPENDIX C**

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 26th day of March on [sic] thousand nine hundred and ninety three.

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Seal: United States
Court of Appeals
Filed: March 26, 1993

DOCKET NUMBER: 92-7325, 92-7327

BI V UNION CARBIDE CHEMICALS
AND PLASTICS CO.

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A petition for rehearing containing a

suggestion that the action be reheard in banc having been filed herein by appellant, Bano Bi, et al.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ELAINE B. GOLDSMITH, CLERK

By: /s
Carolyn Clark Campbell
Chief Deputy Clerk

**APPENDIX D**

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS,

BEAUMONT DIVISION

Civil Action No.

VERIFIED PETITION FOR REMOVAL

| | |
|---|---|
| Ranesh Chand Soni and Mrs. Ranesh Soni, for themselves and as Guardians and Next Friends of their Minor Children; A.K. Sharma; his mother, Gomti Bai; and his father, G. I. Sharma, | § |
| All on behalf of themselves and others similarly situated, | § |
| Plaintiffs, | § |
| -against- | § |
| UNION CARBIDE CORPORATION and UNION CARBIDE OF INDIA, LTD., | § |
| Defendants. | § |

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, BEAUMONT DIVISION:

The petition of defendant UNION CARBIDE CORPORATION ("Union Carbide"), pursuant to 28 U.S.C. §1441 et seq., respectfully shows:

1. Plaintiffs instituted an action against defendants Union Carbide and Union Carbide India Limited ("UCIL") in the District Court of Jefferson County, Texas, entitled Ranesh Chand Soni and Mrs. Ranesh Soni, for themselves and as Guardians and Next Friends of their Minor Children, et al. v. Union Carbide Corporation and Union Carbide of India, Ltd., by filing the Petition on January 3, 1985 and causing the Citation and Petition to be served on Union Carbide on or about January 29, 1985. Upon information and belief, the Citation and Petition have not been served upon UCIL. (A copy of the Citation and Petition are annexed hereto as Exhibit "A" to this Petition for Removal.)

2. The time for Union Carbide to answer or move with respect to the Petition has not expired and no further proceedings have been had herein.

3. The matter in controversy exceeds the sum of Ten Thousand ($10,000) Dollars, exclusive of interest and costs.

4. This is a civil action brought in a state court of which the United States District Courts have original jurisdiction under the provisions of 28 U.S.C. §1332 because of diversity of citizenship, and the defendant Union Carbide is not a citizen of the State of Texas, the state in which the action was brought.

5. As set forth in Paragraph I of the Petition, the plaintiffs are citizens of India. In Paragraph II of the Petition, the plaintiffs allege that they are in the process of obtaining appointments of

citizens of Beaumont, Texas to represent the various estates of the decedents and of the minor children involved in this case, and that those persons, in their representative capacities, will be joined as plaintiffs. Upon information and belief, as of the date of this Petition for Removal, plaintiffs have not obtained such appointments of citizens of Beaumont, Texas or joined such persons as plaintiffs.

6. Defendant Union Carbide is now, and was at the time it was served with the Citation and Petition, a corporation organized under the laws of the State of New York with its principal place of business at Old Ridgebury Road, Danbury, Connecticut 06817.

7. Plaintiffs have fraudulently, improperly and in bad faith joined UCIL as a defendant in the complaint in the state

court action, for the sole purpose of attempting to defeat diversity jurisdiction and attempting to prevent removal to this Court, and consequently, the citizenship of UCIL may be disregarded in connection with the diversity jurisdiction of this Court upon removal. Plaintiffs' Petition contains material misrepresentations of fact as to a Texas state court's personal jurisdiction over UCIL, inasmuch as plaintiffs falsely and fraudulently alleged, without there being any basis whatsoever, that UCIL does business in the State of Texas, and that it may therefore be served with process by and through the long-arm statute of the State of Texas, Vernon's Ann. Civ. St. art. 2031(b).

8. UCIL is not licensed as a foreign corporation doing business in Texas, a fact clearly available to plaintiffs upon reasonable inquiry. UCIL does not have and

has never had any manufacturing facilities, offices or other places of business in Texas. UCIL does not have and has never had any sales representatives, agents, officers or employees engaged in business in Texas, and UCIL does not hold and has never held any sales, directors' or other meetings in Texas. In addition, UCIL has never solicited through the mails, or otherwise offered to sell any of its products in Texas, nor has UCIL ever shipped or contracted to ship its products to or through Texas. UCIL has never participated in any negotiations in Texas or with any resident of Texas, for sale of any of its products. UCIL has never recruited in Texas any persons for employment. Because plaintiffs knew or readily could have ascertained that UCIL has done and does no business in the State of Texas, plaintiffs'

allegations of jurisdictional fact as to UCIL are a sham and were asserted falsely, fraudulently, improperly and in bad faith.

9. Plaintiffs' joinder of UCIL on the theory that it is the alter ego of Union Carbide also does not defeat the diversity jurisdiction of this Court. Under their alter ego theory, the plaintiffs treat UCIL not as a separate business entity with Indian citizenship, but rather as a mere conduit of Union Carbide Corporation with citizenship in Connecticut and New York.[1]

10. Thus, this action is a controversy between plaintiffs, citizens or subjects of

---

[1] Defendant Union Carbide does not agree with the plaintiffs' claim that UCIL is the alter ego of Union Carbide, and expressly reserves its rights to litigate that issue at a later date. Nevertheless, plaintiffs' alter ego theory, even if it were true, would not defeat the diversity jurisdiction of this Court.

a foreign state and defendant Union Carbide, which is a citizen of the United States and not a citizen of the State of Texas. Even if plaintiffs do proceed to appoint as representatives and join Texas citizens as plaintiffs, which, upon information and belief, they have not done as of the date of this Petition, the requisite diversity would still exist as between plaintiffs and Union Carbide which is a citizen of Connecticut and New York, but not of Texas.

11. The matter in controversy exceeds the sum of Ten Thousand Dollars ($10,000.00), exclusive of interest and costs, as the Petition demands damages in the amount of no loess than Twenty Billion Dollars ($20,000,000,000.00), punitive damages in the amount of no less than Thirty Billion Dollars ($30,000,000,000.00), and additional relief in unspecified amounts.

12. This verified petition is accompanied by a bond with good and sufficient surety, as required by 28, U.S.C. §1446(d), and conditioned that Union Carbide will pay all costs and disbursements incurred by reason of this removal should it be determined that this case was not removable or was improperly removed.

WHEREFORE, Union Carbide Corporation respectfully prays that this cause be removed from the District Court of Jefferson County, Texas, to this Court.

STRONG, PIPKIN, NELSON & BISSELL

By: s/
John G. Bissell
14th Floor, San Jacinto Bldg.
595 Orleans
Beaumont, Texas 77701-3255
(409)835-4581

KELLEY DRYE & WARREN

Bud G. Holman
William A. Krohley
101 Park Avenue
New York, New York 10178
(212)908-1800
Attorneys for Defendant
Union Carbide Corporation

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Verified Petition for Removal, Bond for Removal and Notice of Filing of Petition and Bond for Removal has been served upon the following counsel for Plaintiffs by certified mail, return receipt requested this 4th day of February, 1985.

Mr. Benton Musslewhite (NO. P537045969)
609 Fannin Building, Suite 517
Houston, Texas 77002

**APPENDIX E**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. _____

| | |
|---|---|
| RANESH CHAND SONI, ET AL. | § |
| | § |
| VS. | § |
| | § |
| UNION CARBIDE CORPORATION, ET AL. | § |
| | § |

PETITION FOR REMOVAL

COME NOW, ENSERCH CORPORATION and EBASCO-HUMPHREYS & GLASGOW, INC., defendants in the above numbered and entitled cause of action, hereinafter called petitioners, and file this their petition for removal, and by such petition would respectfully show the Court the following:

1. The above captioned action is a civil action originally commenced in the 60th Judicial District Court of Jefferson County, Texas, and is now pending in that

Court. Process was served on petitioners on May 7, 1985.

2. The matter in controversy, exclusive of interest or costs, exceeds the jurisdictional minimum of this Court. By their action, plaintiffs seek damages and injunctive relief for alleged personal injuries and property damages allegedly caused by defendants' in connection with the accident at the Bhopal India Plant of Union Carbide of India, Ltd., on or about December 3, 1984.

3. The plaintiffs' claims for relief as stated in their complaint arise under the treaties of the United States within the meaning of 28 U.S.C. § 1441 (b), the removal statute. As appears from plaintiffs' amended petition, attached hereto as Exhibit "A", the plaintiffs base their claims for relief against defendants upon the

allegation that plaintiffs have standing in the Texas State Court. Plaintiffs' alleged causes of action thus depends upon the existence of "equal treaty rights" between the United States and India. The existence of such alleged "equal treaty rights" between the United States and India is a question of federal law over which this Court has original jurisdiction.

4. Petitioners file this petition, duly verified, in this Court within thirty (30) days after petitioners were served with process herein.

5. Petitioners file herewith a bond with good and sufficient surety, as the law directs, for paying the costs and disbursements incurred by reason of these removal proceedings should this Court determine that this action was not removable or was improperly removed to this Court.

WHEREFORE, PETITIONERS PRAY that this action be removed to the United States District Court for the Eastern District of Texas, Beaumont Division.

Dated this 6th day of June, 1985.

Respectfully submitted,

C. Clint Adams
Suite 840, Enserch Center
300 South St. Paul
Dallas, Texas 75201

s/
E. R. Norwood
Bar No. 15113500
340 Main Street
Liberty, Texas 77575
409/336-6408

OF COUNSEL:

TAYLOR & NORWOOD
340 Main Street
Liberty, Texas 77575

ATTORNEYS FOR PETITIONERS
ENSERCH CORPORATION and
EBASCO-HUMPHREYS & GLASGOW,
INC.

THE STATE OF TEXAS §

COUNTY OF LIBERTY §

BEFORE ME, the undersigned authority, on this day personally appeared E. R. Norwood, who being by me duly sworn on his oath deposed and said that he is an attorney for ENSERCH CORPORATION and EBASCO-HUMPHREYS & GLASGOW, INC., is duly qualified and authorized in all respects to make this affidavit; that he has read the above and foregoing Petition for Removal; and that every statement contained therein is true.

s/
E. R. Norwood

SUBSCRIBED AND SWORN TO BEFORE ME on the 4th day of June, 1985, to certify which witness my hand and official seal.

s/
NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was duly served upon the following:

Benton Musslewhite
609 Fannin Building, Suite 517
Houston, Texas 77002

Thomas Henderson
Frick Building, Rm. 1601
Pittsburgh, Pa. 15219

Joseph C. Blanks
1119 First Texas Bldg.

470 Orleans
Beaumont, Texas 77701

Stephen Sheller
1515 Locust
Philadelphia, Pa.

Gene Locks, Esq.
Greitzer & Locks
1500 Walnut Street, 21st Floor
Philadelphia, Pa. 19102

/s
E.R. Norwood

**APPENDIX F**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. B-85-257-CA

| | |
|---|---|
| RANESH CHAND SONI, ET AL. | § |
| | § |
| VS. | § |
| | § |
| UNION CARBIDE CORPORATION AND | § |
| UNION CARBIDE OF INDIA, LTD. | § |

ORDER

CAME ON this day to be heard the Motion of Plaintiffs to Remand and for Sanctions in the above styled cause, and the Court, having considered the motion and the arguments of the parties, is of the opinion that said motion to remand should be granted, and that Plaintiffs' Motion for sanctions should be denied, and it is, therefore,

ORDERED, ADJUDGED AND DECREED by the Court that Plaintiffs' Motion for Sanctions

be and the same is hereby DENIED; and it is

FURTHER ORDERED, ADJUDGED AND DECREED by the Court that Plaintiffs' Motion to Remand be and the same is hereby in all things GRANTED, and the Clerk is directed to remand this cause forthwith to the District Court of Jefferson County, Texas, from which it was removed.

SIGNED AND ENTERED this the 20th day of February, 1985.

s/
UNITED STATES DISTRICT JUDGE

**APPENDIX G**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. B-85-846-CA

| | |
|---|---|
| RANESH CHAND SONI, ET AL. | § |
| | § |
| VS. | § |
| | § |
| UNION CARBIDE CORPORATION, ET AL. | § |
| | § |

ORDER

Came on to be heard the Plaintiffs' Motion to Remand this cause to the State Court and for sanctions, and the Court being of the opinion that the Motion to Remand should be granted, but the Motion for Sanctions should be denied, it is, therefore,

ORDERED, ADJUDGED AND DECREED that this cause be, and it is hereby, immediately remanded to the State Court of Jefferson County, Texas.

SIGNED AND ENTERED this 27th day of June, 1985.

s/
UNITED STATES DISTRICT JUDGE

**APPENDIX H**

UNION OF INDIA

STATE OF MADYHA PRADESH

CITY OF BHOPAL

BEFORE ME, the undersigned authority, holding the position commensurate with the position of Notary Public in the United States, appeared ABDUL JABBAR KHAN, known to me, and after first being sworn, did upon his oath, - state, swear and affirm as follows:

My name is ABDUL JABBAR KHAN. My father's name is Abdul Sattar Khan. I reside in Bhopal, India. My address is 51 Rajendra Nagar, Bhopal 462016. I am 35 years old, of sound mind, and make this sworn statement on the basis of personal knowledge. The statements incorporated in the attached document are true and correct.

SIGNED THIS, the 25th day of September, 1991.

/s _____

SWORN TO AND SUBSCRIBED before me, the undersigned authority, on this the 25th day of September, 1991.

s/ _____
Notary Public/Commissioner of Oaths
for the State of Madhya Pradesh,
Union of India

UNION OF INDIA
STATE OF MADHYA PRADESH
CITY OF BHOPAL

BEFORE ME, the undersigned authority, holding the position commensurate with the position of Notary Public in the United States, appeared Abdul Jabbar Khan, known to me and, after first being sworn, did upon his oath, state, swear and affirm as follows:

My name is Abdul Jabbar Khan. I reside in Bhopal, India. I am over twenty-one (21) years of age, of sound mind, and make this sworn statement on the basis of personal knowledge. I am the leader of Bhopal Gas Peedit Mahila Udyog Sangathaqn (Bhopal Gas Affected Working Women's Union), the largest organization of gas victims in Bhopal and the only victims' organization which has been continually involved in the legal proceedings.

I have been intimately involved with respect to the claims of victims for damages for death or injury arising out of the Bhopal disaster, which occurred December 2-3, 1984. I am fully familiar with all of the circumstances and events surrounding the efforts of the Bhopal victims, since 1984 to date, to obtain justice for themselves in both the American and Indian courts.

I hereby state, swear and affirm as follows:

1) I am familiar with the first cause of action which was filed on behalf of some of the Indian victims in the United States District Court for the Southern District of New York on December 7, 1984, such action being entitled In Re Union Carbide Corporation Gas Plant Disaster, MDL Docket No. 626. I understand that the Bhopal cases filed in the New York Federal Court remained

pending there up until May 12, 1986, when the Federal District Court dismissed all the cases before it on grounds of forum non conveniens.

2) I am familiar with all the plaintiffs named in the action styled Bano Bi, et al., Plaintiffs v. Union Carbide Corporation et al., Defendants, Civil Action No. 1: 90 CV 883, which is also presently pending in the same U.S. District Court in New York, in which MDL 626 pended. As leader of the Bhopal Gas Peedit Mahila Udyog Sangathan, I work with the Plaintiffs in Bano Bi to employ Mr. Walker and other American counsel and I have discussed with them whether or not they were a part of the original, 1984 action in the New York Federal Court. I can state that to their knowledge, they were not ever listed as a plaintiff in the original action and had not given any American lawyer

actual authority to list them or represent them in the original, 1984 action. Therefore, I can state that they were not an individual or formal party to the Bhopal suit in the Federal Court in New York, at the time this Court dismissed that case on May 12, 1986 on grounds of forum non conveniens.

3> I am also familiar with the proceedings that have been conducted here in India purportedly on behalf of the Bhopal victims. Contrary to Judge Keenan's prediction that the Bhopal case in India would be handled expeditiously and efficiently, the contrary has been true. Suit was filed by the Union of India on behalf of all Indian Bhopal victims on September 5, 1986. It is now September of 1991 and not a cent has been paid to any victim out of the settlement that was allegedly reached on February 14,

1989.

4> Between the time such suit was filed in September of 1986 and the alleged settlement was reached almost three years later, in February 1989, the very things that Professor Marc Galanter had indicated would probably occur in terms of delay, backlog, postponement and deferral, did in fact occur. Because of India's practice of allowing interlocutory appeals on minor subjects and because Union Carbide appealed everything possible in order to delay proceedings, when the alleged settlement was reached in February 1989, the Bhopal case was not anywhere close to being tried. If the phrase "justice delayed is justice denied" ever had any meaning, it has had meaning with respect to the Bhopal litigation in India.

5. Since the settlement was announced, the

vast majority of victims have made it clear that they are completely unhappy with the decision and consider it a product of conspiracy between Union Carbide (UCC) and government officials. Since mid 1989, the Supreme Court of India has been considering appeals by victims seeking to overturn the settlement. The Supreme Court still has not made a final decision. Even if the Supreme Court were to rule on these appeals by the end of the year, I have been told that at least another two years would pass before any distribution would be made to victims. This would be over seven years after suit was originally filed in India by the Union of India and simply goes to show that Professor Galanter was entirely correct in his opinions that endemic delays in the Indian legal system renders India an inadequate alternative forum for handling

the Bhopal litigation.

6. I have been told that Judge Keenan also expressed concern about due process in India and that there was such concern by the American Court of Appeals that it expressly ruled that "(a)ny denial by the Indian Courts of due process can be raised by U.C.C. to the plaintifss' [sic] later attempt to enforce a resulting judgment in this (U.S.A.) country", and also stated that "(b)asic justice dictates that both sides be treated equally." I do hereby state, swear and affirm that the concerns of the Court of Appeals in the United States were well founded and that a rank, egregious and appalling failure of due process has occurred in the Bhopal case in India.

7. Failure of due process has occurred through the triple conflict of interests on the part of the Union of India (UOI). UOI

owns a substantial portion of Union Carbide of India, LTD (UCIL), one of the settling Defendants. UOI also appoints and controls the judges in India and those judges determine the facts as well as the law and therefore constitute the fact-finder in any disputed case. In addition, UOI has had the audacity to arrogate unto itself the right to represent all the potential plaintiffs. So, UOI is in the position of being plaintiff, the defendant and the court. I am sure that a triple conflict of interests of this sort would never be tolerated in any American court.

8. I am also aware of the fact that the Court of Appeals, in strengthening the protections Judge Keenan had given the Union Carbide defendants, expressly acknowledged that a conflict exists where UOI represents both the plaintiffs and one of the co-

defendants, the Court stating:

> UCC contends that Indian courts, while providing an adequate alternative forum, do not observe due procedd [sic] standards that would be required as a matter of course in this country. As evidence of this apprehension, it points to the haste with which the India court in Bhopal issued a temporary order freezing its assets throughout the world and the possibility of serious prejudice to it if the UOI is permitted to have the double and conflicting status of both plaintiff and co-defendant in the Indian court proceedings. 809 f.2d [sic] at 204

Again, I state, swear and affirm that the very conflict that concerned the United States Court of Appeals does in fact blatantly exist with regard to the Bhopal litigation in India, and, in fact, the situation is so bad that the plaintiffs have not been able to get a fair trial, fair treatment or the equivalent of due process.

9. As a result of the pervasive conflicts that exist with regard to the Bhopal

litigation in India, a settlement has been contrived by U.C.C. and UOI, the latter acting as both plaintiff and defendant and allegedly "approved" by the court that UOI controls. All this has been done despite the fact that the vast majority of the victims oppose the settlement. I am attaching as Exhibit A a few clippings which demonstrate how the purported "settlement" has generated vehement opposition from victims, involved professionals and the general public. Therefore, it is inconcievabble [sic] to me that plaintiffs named in Bano Bi could in any way, in law, justice or equity, be bound by the "settlement" engineered by UOI, acting as plaintiff, defendant and the court.

10. In connection with the foregoing, I herey [sic] state, swear and affirm that the plaintiffs named in Bano Bi oppose the

purported settlement reached by UOI and none of said plaintiffs have received any compensation out of any "settlement". or [sic] personally executed any kind of release in favor of any of the Union Caride [sic] defendants. As far as all of the plaintiffs in the Bano Bi case are concerned, they have not settled their case with Union Caride [sic] defendants, they do not intend to settle their case on the terms of the alleged "settlement" and they intend to pursue their causes of action in the United States. In this connection, they have employed Wayne Walker and other American attorneys to pursue their cases in the United States; they have agreed to pay him a contingent fee and assinged [sic] to him a portion of their cause of action against UCC and the other defendants. In sum the Bano Bi plaintiffs have never

settled their case with the Union Carbide defendants.

11. I also state, swear and affirm that the plaintiffs named in the Bano Bi case, have not, so far as they know, ever authorized UOI or anyone representing UOI to settle their cases, on their behalf, with the Union Carbide defendants. Therefore, the settlement now relied upon by the Union Carbide defendants in the American courts must be considered to not have been finalized by an "authorized representative" of the Plaintiffs named in Bano Bi.

12. I also state, swear and affirm that the Plaintiffs named in the Bano Bi case had no notice of the purported settlement reacbhed [sic.] by UOI, allegedly on their behalf and were never given, at any time prior to the alleged consummation of the settlement, notice of the fact that, allegedly on thier

[sic] behalf, UOI was attempting to negotiate a settlement. Nor did they have any notice of the terms upon which UOI was allegedly attempting to negotiate the settlement. Furthermore, the Bano Bi plaintiffs were never given the opportunity either individually or through their chosen representatives, to participate in the settlement negotiations. In addition, since the alleged settlement was purportedly reached, the Bano Bi plaintiffs have received no formal notice of the same, have been given no opportunity to appear before the Indian court concerning thier [sic] views on the settlement (I am not speaking here of the Appeal now pending before the Indian Supreme Court, whereby we seek to knock out the entire settlement, but we are talking about a proceeding similar to the "fairness hearing process" required in

American courts with respect to class action settlements); and have not been given the opportunity to express their views to the party who purports to represent them, namely, the Union of India.

13. Therefore, I hereby state, swear and affirm that the Bano Bi Plaintiffs did not have fair notice of the Indian action brought allegedly on their behalf by the Indian Government nor did they have fair notice of the settlement allegedly negotiated on their behalf by UOI. Indeed, the Indian Supreme Court, in a decision to uphold the Bhopal Act, acknowledged that victims had not been given adequate notice.

14. I further state, swear and affirm that UOI did not adequately, fairly or properly represent the Bhopal victims. This is true for several reasons:

a. UOI did not give victims notice,

consult with them, keep them informed or allow them to participate in any way in the Indian legal proceedings.

b. Particularly, UOI did not give victims notice of the settlement negotiations. Terms were decided in the closed chambers of the Chief Justice; victims and the general public were only informed after finalization. Information indicating the basis of the $470,000,000 settlement amount still has not been disclosed; further, no distribution plan has ever been presented.

c. UOI had a profound and shocking conflict of interest all the way through the litigation; UOI owned an interest in one of the defendants, it controlled the courts and also purported to represent the plaintiffs.

d. UOI did not vigorously prosecute the action on behalf of the Plaintiffs but

instead allowed continual delay and was generally dilatory in its representation of the Plaintiffs.

e. There are strong indications that from the time UOI switched its position in the American action, from seeking to have the Bhopal case litigated in the United States to having it litigated in India, it began a course of collusion with its co-defendant UCC and its subsidiaries, all to the severe detriment of the victims, including the Bano Bi Plaintiffs.

f. The settlement that UOI allegedly negotiated on behalf of the Plaintiffs is a disgrace and grossly inadequate. When compared to the total amount required for rehabilitation, it shocks the conscience. To date, more than 11,000 death claims have been filed with full evidence that the deaths were due to gas exposure. More than

4,000 other death claims are pending because survivors do not have medical documentation required by the claims processing authorities. The 1990 annual report of Indian Council of Medical Research (ICMR) records 508,000 injuries sustained by surviving gas victims. Please see Exhibit B for a full survey of ICMR's reports showing the continued morbitity [sic] of gas victims. As this article indicates, rehabilitation costs will far exceed the $470,000,000 amount; adequate health and economic rehabilitation will require in excess of 4 billion dollars.

g. Thus, for all the reasons stated in a-f above, I hereby state, swear and affirm that even in UOI was a legitimate representative of the Bhopal gas victims (which it could not have been due to the conflicts of interests discussed above), it

did not fairly or competently represent the victims in the Indian proceedings. Further, there was a failure of representation regarding the American proceedings when UOI switched positions from one of supporting U.S. jurisdiction to one opposing U.S. jurisdiction.

15. In connection with the claim by the Union Carbide Defendants regarding statute of limitations in the United States, I hereby state, swear and affirm as follows:

a. The suit filed in the United States in December of 1984 contained class action allegations and the federal court in New York at no time prior to the final dismissal of that case, acted upon or denied the class action request. The dismissal of the first action in the New York Federal Court did not become final until October 5, 1987, when the United States Supreme Court

denied petition for writ of certiorari. Meanwhile, a class action was filed in the state court in Beaumont, Texas in 1985 and it remained pending until it was dismissed in late 1988, with such dismissal becoming final in early 1989. Again, the judge in that case did not ever act upon the class action request and no class action was ever denied. I hereby state, swear and affirm that the Plaintiffs in the Bano Bi case relied upon the pendency of those class action proceedings in not filing the Bano Bi suit before October 1990. The Bano Bi Plaintiffs reasonably believed that they did not have to file suit in the United States while any of the class action suits were pending and that they would have two years after all class action suits had been dismissed, in which to file in Texas. I further state that the named Plaintiffs in

the Bano Bi are substantially different from the Plaintiffs named in the 1984 class action filed in New York.

b. As was stated by the Union Carbide lawyers, the Bhopal Act was adopted on March 29, 1985 and it contained some language to the effect that UOI had the "exclusive right to represent and act in place of every person who has made or is entitled to make a claim with respect to the Bhopal disaster. UOI filed suit in the Bhopal District Court on September 5, 1986. At that time, I hereby state, swear and affirm that the plaintiffs listed in the Bano Bi petition reasonably believed that they could not act and were, in effect, enjoined from acting on their own in any other court. In addition, as stated y [sic] the Defendants, the Indian Courts on February 15, 1989 ordered that "(a)ny . . . suits, claims or civil . . .

proceedings filed or to be filed before any court are hereby enjoined and shall not be proceeded with before such court . . . except for dismissal or quashing . . . of this order." Again, I hereby state, swear and affirm that the Bano Bi Plaintiffs reasonably believed that both the 1986 and 1989 orders of the courts in India prohibited them from filing the suit such as the one that has been filed in this, the Bano Bi case.

c. Of the plaintiffs named in the Bano Bi case, those listed on Exhibit "C" attached hereto and incorporated herein by reference were less than twenty years old in October of 1990, when suit was filed in this case in the state court of Texas.

d. I hereby further state, swear and affirm that all of the Plaintiffs named in the Bano Bi case fall in one or more of the

following categories:

i) That he/she or they did not, despite the exercise of due diligence and reasonable care, discover his/her cause or their cause of action or that their illness or injury caused by gas exposure become manifest within two years of the filing of the suit in October of 1990. In this connection, Plaintiffs would show that the Union Carbide people are still denying that the Bhopal gases caused anything more than minor symptoms of acute distress at the time and during the immediate aftermath of the gas leak on December 2-3, 1984. Thereafter, plaintiffs erroneously but reasonably relied upon such statements by UCC and government officials indicating that the Plaintiffs did not have a valid cause of action.

ii) That the Defendants and UOI presented to the Bano Bbi [sic] Plaintiffs,

in various publications and through other official and non-official sources, that victims did not have the right to sue in the United States both because of the Bhopal Act and because of various rulings or legal doctrines in the American Courts. Defendants and UOI further represented that the Bhopal gases did not cause the kinds of injuries and deaths which the Bano Bi Plaintiffs experienced. The Defendants and UOI represented that they would compensate the Plaintiffs for their injuries on a reasonable and fair basis. The Bano Bi Plaintiffs relied upon all these representations in no filing suit in Texas prior to October 1990. Therefore, we believe the Defendants should be equitable estopped from claiming that the statute of limitations bars the Bano Bi suit.

iii) That the Defendants and UOI

fraudulently concealed from the Bano Bi Plaintiffs the true facts about what the Bhopal gases could cause on a long term basis and what kind of medical problems could crop up after substantial latency periods. They also fraudulently concealed the full nature of their collusion and their apparent plan to lead the victims, including the Bano Bi Plaintiffs, into believing that they did not have rights except in the Indian courts and that they could not institute legal proceedings in the United States; pursuant to that plan, they further colluded to force upon the Plaintiffs a grossly inadequate settlement and then used such fraudulent settlement as a means of barring legitimate proceedings in the United States; part of this fraudulent concealment included the concealment of the true nature of the victims causes of action, as well as

the places where they could legitimately bring thier [sic] action; by reason of all the foregoing, the Bano Bi plaintiffs state that the statute of limitations should be tolled to within a short time of the filing of this suit.

16. In summary, I want to comment on the state of affairs in India today. During the past year, the political-economic scene of India has become increasingly chaotic. This situation was clearly exacerbated by the assasination of Rajiv Gandhi and the subsequent instability of Parliament. Further, the return to power of the Congress Party has reestablished the very government which contrived the alleged settlement on behalf of Bhopal victims. For many years, the Congress party has been regarded with suspicion due to rampant corruption and due to their commitment to an economic policy

which caters to the economic interests of industrialists and other elites. This suspicion was given particular example after Rajiv Gandhi's visit to the United States in 1986 and the subsequent switching of UOI's position from support of U.S. jurisdiction to demanding Indian jurisdiction.

All of this may have been made more uncertain by the political instability which now prevails in India. When this overlay of instability and uncertainty is considered with all of the delay, stalling and procedural inadequacies which have now been shown to be the true situation of this case in India, and considered with conflicts of interest and the grossly inadequate representation that UOI has given to the Bhopal victims, and considered with all the other reasons given by Professor Marc Galanter as to why India is an inadequate

forum for a just disposition of the victims' rights in the context of fair due process, I do not see how this Honorable Court or any American court can possibly conclude at the time that the Indian courts constitute a reasonable alternative forum in this case. For the Court's edification, I am attaching, as exhibit "D", a few copies of articles in the press concerning the political instability in India at this time.

SIGNED THIS, the 25th day of September, 1991.

/s _____

SWORN TO AND SUBSCRIBED before me, the undersigned authority, on this, the 25th day of September, 1991.

s/
Notary Public/Commissioner of Oaths
for the State of Madhya Pradesh
Union of India

## APPENDIX I

Before me, the undersigned authority appeared Kim Laughlin, known to be, and after first being sworn, dead [sic] upon her oath; state, swear and affirm as follows.

My name is Kim Laughlin; I am over the age of twenty-one years; of sound mind, and make this statement on my own free will and state that it is based on personal knowledge.

I am a doctoral candidate at Rice University in the Department of Anthropology. My educational background has prepared me to assess the role of science and technology in society. The subject of my Ph.D. research is the long term social and economic impact of the Bhopal gas disaster of 1984. I resided in Bhopal from

September 1990 through June 1991. During this time I worked directly with the leaders and members of Bhopal Gas Peedit Mahila Udyog Sangathan (Bhopal Gas Affected Working Women's Union) (BGPMUS), the largest victims' organization in Bhopal. I have also worked with leaders of Bhopal Group for Information and Action (BGIA), an organization of educated volunteers who serve as English language representatives of BGPMUS. I also have had numerous discussions with Indian legal experts, political leaders, health professionals, and bureaucrats who have been involved in the Bhopal case. I also have done archival research to analyze documents and other materials generated in the six years since the disaster. The following statements are derived from my research efforts and material:

## I. REGARDING THE MOTION TO REMAND BASED ON THE ISSUE OF IMPERSONAM JURISDICTION

A. Union Carbide Corporation (UCC) is the alter ego of Union Carbide India Limited (UCIL). The intimate connection between UCC and UCIL was described by Business India in the following excerpt:

Just how close the relationship between the two companies actually was can be seen from the fact that four senior executives of UCC's regional division, Union Carbide Eastern (UCE), including its chairman, were members of UCIL's board of directors. UCIL's budgets, major capital expenditures, policy decisions and company reports had to be approved by UCC corporate headquarters. The Bhopal plant formed an integral part of UCC's agricultural products division (APD),

and was directly under the control of the director, APD, at the UCE headquarters in Honk [sic] Kong. The director, APD, in turn occupied the position of executive vice president at UCC. Thus the chain of command stretched all the way from Bhopal to corporate headquarters in Danbury, Connecticut. (December 2-15, 1985)

Specifics connecting UCC to the Bhopal subsidiary are as follows:

1. 50.9% of UCIL stock was held by UCC.

2. UCC approved a site choice for the Bhopal plant which situated hazardous production facilities adjacent to already existing residential communities and barely two kilometers from the main railway

station. The Bhopal plant fell out of compliance with city ordinances when, in 1974, it began manufacturing rather than simply formulating pesticides. As the twenty-first-largest company in India and employer of over 10,000 people, UCIL was sufficiently influential to override the city's objections to their location through approval from central and state government authorities.

3. The decision to use and process methyl isocyanate (MIC) in Bhopal was made by UCC. From 1958 to 1973, the end product Sevin was manufactured without using MIC. Carbide switched to MIC dependent method when it became the cheaper alternative. During the first years the Bhopal plant was operating, MIC was imported from the parent company. The decision to build a MIC

processing unit in Bhopal was based on the need to "backward integrate" so that raw materials were produced on site, thus saving transportation costs and exploiting economies of scale. The context of the decision to manufacture MIC domestically was one of increasing competitiveness and industry decline due to local agricultural conditions.

4. The process procedure used to manufacture MIC in Bhopal was an open circuit process chosen, for economic reasons, over the closed circuit process used by Bayer Corporation. Carbide's open circuit process required bulk storage of MIC and thus precipitated the storage management problem which led to the disaster.

5. Design of the UCIL plant and

particularly the MIC unit was carried out and approved by UCC. Significant plant design features approved by UCC include the following:

a. Regulatory and alarm mechanisms at the Bhopal plant were manual and dependent on human detection. At a sister plant in Institute, West Virginia, control systems were automatic and computer monitored.

b. Storage tanks in Bhopal held 40 tons of MIC while Institute had small drum storage. An affidavit on the decision to bulk store was filed in the Federal District Court in Manhattan by Edward Munoz, a retired Vice President of UCC and Managing Director of UCIL during the design of the Bhopal MIC unit. Munoz states that UCIL

personel [sic] preferred a design plan for nominal storage based solely on downstream process requirements. UCC insisted on large-scale storage.

c. The refrigeration unit was too small (30tn) to help control a runaway reaction. Further, a water based brine solution was used as a coolant whereas in Institute a more expensive chloroform cooling system was used. The brine solution could have been a source of water contamination of storage tank contents.

d. In Bhopal, there was no means for continuous check of the purity of MIC. In case of failure in the final refining process, off-grade MIC would be mixed with previously stored material, introducing large scale contamination and danger. In

Institute, interim tanks were provided between the refining system and the storage tank so that newly produced MIC could be checked for purity.

e. The storage tank was pressurized through copper tubing, making it possible for copper filings to be mixed with MIC. Union Carbide information on MIC itself states that copper can cause a dangerously rapid trimerisation, generating sufficient heat to cause a reaction of explosive violence.

f. Vent gas headers were made of carbon steel. In the absence of check valves, back pressure inside the header would push material back into the storage tank, possibly carrying with it rusted coating from the vent header walls. Carbon

causes a catalytic reaction when in contact with MIC.

g. A jumper line modification was made in May 1984 to provide a standby in the event that either the relief valve vent header or the process vent header needed to be shut down for repair. According to the Indian Central Bureau of Investigation inquiry into the disaster, approval for this design modification was given by UCC. The jumper line connected the relief-valve vent header to the process-vent header, allowing water ingress into the MIC storage tank. MIC in reaction with water set off the exothermic process which led to the pressure build up and release of gas into the atmosphere of Bhopal.

h. The vent gas scrubber,

intended to neutralize leaks with a caustic soda solution, was built to handle a maximum pressure of 15psi. The rupture disk channeling gas into the scrubber was set to release at 40psi. Thus, even in circumstances of controlled flow, the scrubber could only accommodate 38% of the gas moving through it.

i. The flare tower, though purportedly part of the MIC safety system, was only designed for slow, steady burn off of carbon monoxide during phosgene (a component of MIC) production.

j. The water sprinkling system could not spray high enough to reach the gas. When the company fire truck arrived on the scene, it, too, was unable to spray water the 120 feet to the top of the vent

gas scrubber, where the gas was gushing out.

6. Maintenance of the UCIL facility was overseen by UCC. This was demonstrated by periodic safety checks by UCC personnel. On at least three occasions, UCC safety auditors recommended the formulation of an evacuation plan for the residential communities adjacent to the plant. UCC was aware these recommendations were never carried out.

7. Quality and quantity of plant personnel was overseen by UCC. Worker manuals were produced in the United States and distributed in English. Senior plant personnel were given training at a sister plant in Institute, West Virginia; 80% of these workers left UCIL in the four years preceding the disaster due to low morale

partially caused by awareness that the Bhopal plant tolerated negligence and lack of safety consciousness. The plant's 1982 operational safety survey documented regular breaches of basic safety rules and warned of the problems which could accompany staff reductions. Please see Appendix 1 for graphs showing staff reductions.

8. UCC financed and managed public relations after the disaster, first by shifting crisis management activities to corporate headquarters in Danbury, Conneticut [sic] and then by hiring Burson Marstellar, one of the largest public relations firms in the world.

9. UCC managed "Operation Faith", the effort to safely neutralize the MIC remaining in storage tanks after the major

leak on 2/3 December.

10. UCC was the defendant in the Indian litigation of the Bhopal case; UCC was the party which negotiated and accepted the February '89 settlement; UCC provided nearly 90% of the $470,000,000 settlement amount to the Indian Reserve Bank (UCIL provided 45,000,000); news of the settlement caused UCC stock to rise $2 a share.

B. Union Carbide India Limited (UCIL) is present in Texas through their relationship with Humphreys and Glascow, a Bombay engineering firm domiciled in Texas under the name of Ensearch [sic]. From the period 1972 to 1980, UCIL supervised 55 to 60 engineers employed by Humphreys and Glascow in detailing summary constructions plans provided by UCC.

C. Ensearch [sic], a defendant in this case domiciled in Texas, is responsible for many of the design decisions which led to the 1984 gas leak. Ensearch [sic] was hired to adapt UCC's "process design package" to the context of the Bhopal facility. Ensearch [sic] was involved in the decisions which led to design and construction much less safe than that in the Union Carbide plant in Institute West Virginia.

II. REGARDING THE MOTION TO DISMISS BASED ON ADEQUATE ALTERNATIVE FORUM AND THE MOTION FOR SUMMARY JUDGMENT BASED ON THE ALLEGED EFFECT OF THE SETTLEMENT NEGOTIATED IN THE INDIAN PROCEEDINGS

A. Since 1985, it has become clear that India cannot provide an alternative adequate forum. The February '89 settlement

preempted a trial on the merits of the case and came about through numerous failures of due process:

1. On March 29, 1985, the Indian Parliament enacted the Bhopal Gas Leak Disaster (Processing of Claims) Act, granting Union of India (UOI) the exclusive right to represent the victims in India or elsewhere. Thereafter, UOI has represented the Bhopal victims in the capacity of parens patriae. The Bhopal Act itself is a breach of due process because it involves conflicts of interest: while representing the victims, UOI also owns a substantial portion (22%) of UCIL stock and controls the courts, since judges are appointed and there are no juries. Thus, in the Indian proceedings, UOI has been plaintiff, defendant and the court.

The overlapping responsibilities of UOI has precluded the possibility of an impartial tribunal. This structural problem is magnified by the current political-economic environment in India. Since the early eighties, the orientation of Indian development has changed. In the decades following Indian independence in 1947, there as an overt attempt to maintain self-sufficiency through minimalized dependence on foreign investment and technology transfer. This agenda did not provide adequate growth to keep up with the demands of a growing welfare state and increasing national indebtedness. Hence, policy changes in the eighties redirected the economy toward greater utilization of outside resources.

The current dependence of the Indian

economy on foreign investment has undermined the capacity of the Indian State to fairly evaluate the distribution of risks and benefits which accrue through industrial development. Because it is obliged to attract foreign investment, the Indian government is forced to let market considerations override all other concerns. Thus, it is impossible for the Indian government to fairly adjudicate the claims of those victimized by corporations fulfilling investment demands. It is publicly recognized in India that a harsh decision against Carbide would be a deterrent to economic goals. The problem of Third World governments being caught in a double-bind wherein they promote their economies at the cost of safety for their citizens is well recognized in the social science literature.

2. There has been a failure of representation on the part of UOI as parens patriae of the gas victims. This failure is indicated by the paucity of research carried out before arriving at a settlement amount. At the time of the settlement, fewer than 50,000 victims had been assessed for personal injury. The results of this initial assessment were not made public until April 1989, two months after the settlement was finalized.

The great majority of victims contest the adequacy of the settlement because it is insufficient to cover compensation and rehabilitation costs. Approximately 600,000 persons have filed for damages based on physical proximity to the plant. Medical monitoring of the health status of these claimants alone would cost in excess of

$6,000,000. Conservative estimates for full compensation range between one and two billion dollars. Please see Appendix 2 for details. Further, according to the terms of the settlement, the Indian government has first access to reimburse itself for litigation costs, interim relief payments and general economic loss. Government reimbursement alone could easily consume much of the settlement, leaving little for the present and future claims of victims.

Within India, it is not possible to correct the settlement's inadequacies because of UOI's involvement in denial of the magnitude of the disaster. Medical categorization data produced by the Madhya Pradesh State Government and released in 1991 indicates that out of a gas affected population of over half a million people,

only forty individuals are permanently disabled. The release of this data generated disbelief and outrage within the medical community. Doctors affiliated with the organization Socially Active Medicos (SAM) have denounced the data as corruption of scientific means for political ends. They critique the testing protocol for being insufficiently thorough and for blatantly ignoring long term and multisystemic ailments. Please see Appendix 3 for elaboration on problems with medical categorization data now available in India.

Attempts to produce alternative medical documentation through the voluntary sector has led to confiscations and arrests. Officially produced data is not available to interested health professionals. Hence, the research basis for representation of gas

victims in India is unavailable.

3. Victims were given no notice of the settlement prior to it being finalized and publicly announced. Such notice was clearly possible through public news releases or through mailings to victims included on a computerized list used for registering claims. Notice also could have been given through any of the victims organizations in Bhopal. The Supreme Court of India itself recognized this failure of due process during its review of the Bhopal Act. While the Supreme Court upheld the validity of the Bhopal Act, it conceded that victims were not given notice.

Former Chief Justice of the Indian Supreme Court P. N. Bhagwati has critiqued the settlement decision for the following

reasons:

a. The settlement order emerged from appeal arguments and not from proceedings directed toward final judgment. In disposing of the compensation case, Bhagwati argues that the Indian judiciary overstepped accepted principles of jurisprudence.

b. The settlement amount of $470,000,000 was not based on knowledge of rehabilitation costs and "places the value of Indian life at a ridiculously low figure."

c. Settlement offers and counter-offers were not made in open court but in the Chamber of the Chief Justice. In failing to consult or even notify victims,

Bhagwati argues that "the Government forgot that it was not prosecuting a case of its own but was acting as a trustee." (IndiaToday March 15, 1989)

4. The 1989 settlement order did not contain a distribution plan. Such a plan still has not been publicized. Thus, it is not known how much will be allocated to each individual, particularly since the Government has first option to reimburse itself for expenses. Further, the settlement order did not give attention to future claims.

5. Victims have never been given the opportunity to opt out of the February '89 settlement or of the litigation all together. However, sustained protest by victims has clearly indicated opposition.

In a major demonstration protesting the settlement in August 1989, police brutally attacked demonstration participants. This attack is publicly recognized in India as a show of the government's refusal to attend to victims' demands. See Appendix 4 for documentation on victim protest against the settlement.

III. REGARDING THE ISSUE OF RES JUDICATA PER PREVIOUS DISMISSAL ON GROUNDS OF FORUM NON CONVENIENS

A. The present case (Bano Bi, etc.) is a substantially different case from that dismissed from the Federal Court of New York in 1986 on grounds of forum nonconveniens [sic]:

1. The parties listed in the present

case do not know themselves to be listed as plaintiffs in the previous case. The defense's contention that the names listed in this case duplicate those listed in the 1986 proceedings is perhaps grounded on a lack of understanding of Indian culture and language. Indian names are extraordinarily repetitive because specificity is designated by attaching names of extended family members. Further confusion arises from the transliteration of Indian names from Hindi script into the roman alphabet.

2. The parties listed as plaintiffs in this case all have new causes of action. These plaintiffs were selected to fill the following categories: minor children born with birth effects [sic] as a result of their parents exposure, minor children exposed to the gas, survivors of persons who

have died in the last two years, adults who manifested major injury in the last two years, women who have suffered miscarriages or still birth in the last two years.

3. The progress of the case thus far in India has verified that India does not provide an adequate alternative forum. Please refer to Section II, where failures in due process are discussed.

Further, it is clear that Professor Marc Galanter's analysis of the Indian legal system was correct in suggesting that there are structural inadequacies which make due process according to American law almost impossible in Indian courts. These inadequacies include both procedural and substantive aspects:

a. Tort law is not sufficiently developed to deal with highly technical concerns.

b. There are no juries and the courts are not independent of other governing bodies.

c. There is only limited discovery and little infrastructure within legal practice to carry out research.

d. There is not an effective means to circumvent long delays.

Last, it is clear that India has not and cannot provide an adequate alternative forum to the US courts because of UOI's commitment to an economic policy dependent on foreign investment. Please see Section

II.1 for elaboration. A specific and substantive build-up in India's investment dependent agenda occurred this year with the acceptance of an IMF loan. IMF lending comes with austerity requirements that forcibly compels the creation of attractive markets. Social science literature clearly documents the decline of neutral jurisprudence in Third World contexts shaped by external debt obligations.

4. As of this date, there is more evidence that in 1985 to indicate that private interest factors regarding location of witnesses, of major papers, etc. compel the case being handled in the United States. Please refer to Section I for a listing of UCC's involvement in the crucial decisions which led to the disaster.

Further, it is clear that medical categorization data from which a compensation amount could be derived will have to be generated from sources other than those now relied on in India. UOI's categorization data is blatantly unscientific and insufficiently thorough to provide the basis for computing past and expected costs.

5. Contrary to the previous case, the plaintiffs for Bano Bi, etc. stipulate that they will only use American experts on liability, that the plaintiffs will present themselves in the United States for depositions and for examination by defendant's chosen doctors and that they will pay costs for the defense counsel to go to India to take relevant depositions.

IV. REGARDING THE MOTION FOR SUMMARY JUDGMENT BASED ON STATUTES OF LIMITATION

a. Statutes of limitation should not bar this case for the following reasons:

1. All representatives for this case either discovered their cause of action or their cause of action arose within the last two years. Please refer to Section III.2 for details.

2. Since the occurrence of the Bhopal disaster in December 1984, there has not been any period of two years in which some form of representative litigation was not underway. Thus, victims assumed that their interests were being continually represented. This assumption was furthered by the victims knowledge that UOI was

representing their interests according to the terms of the Bhopal Act. Until the February 1989 settlement, gas victims had reason to believe that UOI was adequately representing their interests. It was also known that Judge Keenan's 1985 dismissal included a proviso which tolled statutes in the United States until the case was finalized in India. The case remains under review by the Indian Supreme Court.

3. Up through the time of the February 1989 settlement, UCC in concert with UOI has led the plaintiffs to believe that they would take care of damages through provision of compensation, public health care, jobs suited to those with disability and housing. Plaintiffs were thus equitable estopped from initiating alternative litigation.

4. Until January 1990, the survey data produced by the Indian Council of Medical Research was held under the confines of the Official Secrets Act. Also held were individual medical folders showing the results of examinations and laboratory testing. It can thus be said that until January 1990, victims did not discover the extent of their current injury. Since UCC has never admitted medical causation, victims are continually told that their various ailments are not gas related. An example of this is the extraordinary occurrence of tuberculosis in Bhopal. While it is likely that this is related to pulmonary and immune system damage caused by gas exposure, tuberculosis patients are not recorded as MIC patients.

5. Thorough research documenting the

long term effects of MIC exposure has been concealed from victims. Victims thus do not know if their health condition will continue to deteriorate. Academic medical literature has shown that methyl isocyanate causes chromosomal aberration and thus could lead to extraordinary rates of cancer. Health care now available in Bhopal does not include monitoring which could document the onset of long term effects.

CONCLUSION

Evaluation of the Bhopal phenomena has indicated three major points of particular relevance to this litigation:

1) UCC played a controling [sic] role in all UCIL functions. Plant design features which precipitated the disaster were put

forth and finally approved by the parent company. Other significant factors, including site location and personel [sic] reductions, were also approved by UCC.

2) The medical categorization data generated by the Madhya Pradesh State Government is grossly unscientific and unacceptable as a basis for rehabilitation efforts. Controversies over this data has revealed UOI's role in denying the magnitude of compensation requirements both to veil thier [sic] own culpability and to protect broad economic development agendas requiring foreign investment. It has thus become clear that Indian courts, as an arm of UOI, cannot provide an adequate form [sic] to adjudicate the Bhopal case. Conflicts of interest are further complicated by UOI's role as parens patriae representative of the

victims.

3) The settlement amount of $470,000,000 determined in the Indian proceedings is clearly insufficient to compensate and rehabilitate over half a million Bhopal victims. Conservative estimates have costed rehabilitation needs in the range of 2 billion dollars. The "full and final" clause of the settlement is of particular concern due to continued health deterioration and the liklihood [sic] of long term effects.

SIGNED THIS, the 14the [sic] day of August, 1991

s/
Kim Laughlin

SWORN TO AND SUBSCRIBED before me, the undersigned authority, on this, the 14th day of August, 1991.

s/
Notary Public, State of Texas

SEAL
ANGELICA JIMENEZ
MY COMMISSION EXPIRES
JUNE 27, 1995

**APPENDIX J**

BEFORE ME, the undersigned authority, holding the position commensurate with the position of Notary Public in the United States, appeared KIM LAUGHLIN, known to me and after first being sworn, did upon her oath, state swear and affirm as follows:

My name is Kim Laughlin. I am an American citizen; my permanent address is 8 Shadow Lane Houston, Texas 77080. I am in India conducting research sponsored by Rice University. My address while in India is c/o EKlavya, E-1/208 Arera Colony, Bhopal 462016. I am 27 years old, of sound mind and make this sworn statement based on personal knowledge:

> The news articles attached are genuine and are presented to the court to demonstrate gas victim dissent against the terms of the

recent judgement from the Supreme Court of India regarding the February '89 settlement between Union Carbide Corporation and the Government of India. Most significantly, the victims contest the following:

1) The courts have failed to acknowledge the denial of due process involved in failing to obtain victim consent to the terms of the settlement.

2) There has been a failure of representation by the Government of India in arriving at the $470,000,000 settlement amount without substantive basis.

3) A clear distribution plan still has not been made

available. However, it has been indicated that compensation will only be available to the 30,000 individuals categorized as injured by the Madhya Pradesh State Government. Data from Indian Council of Medical Research identifies morbidity in over 500,000 individuals. Thus, the judgement's condition that the Government of India's must make up any lack in the settlement amount does not offer any security to the majority of gas affected people.

SIGNED THIS, THE 9TH DAY OF OCTOBER, 1991.

s/_____

SWORN TO AND SUBSCRIBED BEFORE ME, THE UNDERSIGNED AUTHORITY, ON THIS, THE _____ DAY OF OCTOBER, 1991.

s/
Notary Public for the State of Madhya Pradesh, Union of India

APPENDIX K

# THE BHOPAL GAS LEAK DISASTER (PROCESSING OF CLAIMS) ACT, 1985

(ACT 21 OF 1985)

(AS PASSED BY THE HOUSES OF PARLIAMENT--

RAJYA SABHA ON 18TH MARCH, 1985

LOK SABHA ON 27TH MARCH, 1985)

ASSENTED TO
on 29 MAR 1985
Act No. 21 of 1985

**Bill No. V-F of 1985**

# THE BHOPAL GAS LEAK DISASTER (PROCESSING OF CLAIMS) BILL, 1985

(As Passed by the Houses of Parliament)

A

BILL

to confer certain powers on the Central Government to secure that claims arising out of, or connected with, the Bhopal gas leak disaster are dealt with speedily, effectively, equitably and to the best advantage of the claimants and for matters incidental thereto.

Be it enacted by Parliament in the Thirty-sixth Year of the Republic of India as follows:--

**Short title and commencement.**

1. (*1*) This Act may be called the Bhopal Gas Leak Disaster (Processing of

Claims) Act, 1985.

**Definitions.**

(2) It shall be deemed to have come into force on the 29th day of February, 1985.

2. In this Act, unless the context otherwise requires,--

(a) "Bhopal gas leak disaster" or "disaster" means the occurrence on the 2nd and 3rd days of December, 1984, which involved the release of highly noxious and abnormally dangerous gas from a plant in Bhopal (being a plant of the Union Carbide India Limited, a subsidiary of the Union Carbide Corporation, U.S.A.) and which resulted in loss of life and damage to property on an extensive scale;

(b) "claim" means--

(i) a claim, arising out of, or connected with, the disaster, for

compensation or damages for any loss of life or personal injury which has been, or is likely to be, suffered;

(ii) a claim, arising out of, or connected with, the disaster, for any damage to property which has been, or is likely to be, sustained;

(iii) a claim for expenses incurred or required to be incurred for containing the disaster or mitigating or otherwise coping with the effects of the disaster;

(iv) any other claim (including any claim by way of loss of business or employment) arising out of, or connected with, the disaster;

(c) "claimant" means a person entitled to make a claim;

(d) "Commissioner" means the Commissioner appointed under section 6;

(e) "person" includes the Government;

(f) "Scheme" means a Scheme framed under section 9.

*Explanation*--For the purposes of clauses (b) and (c), where the death of a person has taken place as a result of the disaster, the claim for compensation or damages for the death of such person shall be for the benefit of the spouse, children (including a child in the womb) and other heirs of the deceased and they shall be deemed to be the claimants in respect thereof.

**Power of Central Government to represent claimants.**

3. (*1*) Subject to the other provisions of this Act, the Central Government shall, and shall have the exclusive right to, represent, and act in place of (whether

within or outside India) every person who has made, or is entitled to make, a claim for all purposes connected with such claim in the same manner and to the same effect as such person.

(2) In particular and without prejudice to the generality of the provisions of sub-section (1), the purposes referred to therein include--

(a) institution of any suit or other proceeding in or before any court or other authority (whether within or outside India) or withdrawal of any such suit or other proceeding, and

(b) entering into a compromise.

(3) The provisions of sub-section (1) shall apply also in relation to claims in respect of which suits or other proceedings have been instituted in or before any court or other authority (whether

within or outside India) before the commencement of this Act:

Provided that in the case of any such suit or other proceeding with respect to any claim pending immediately before the commencement of this Act in or before any court or other authority outside India, the Central Government shall represent, and act in place of, or along with, such claimant, if such court or other authority so permits.

**Claimant's right to be represented by a legal practitioner.**

4. Notwithstanding anything contained in section 3, in representing, and acting in place of, any person in relation to any claim, the Central Government shall have due regard to any matters which such person may require to be urged with respect to his claim and shall, if such person so desires, permit at the expense of such person, a

legal practitioner of his choice to be associated in the conduct of any suit or other proceeding relating to his claim.

**Power of the Central Government.**

5. (*1*) For the purpose of discharging its functions under this Act, the Central Government shall have the powers of a civil court while trying a suit under the Code of Civil Procedure, 1908 in respect of the following matters, namely:--

(*a*) summoning and enforcing the attendance of any person from any part of India and examining him on oath;

(*b*) requiring the discovery and production of any document;

(*c*) receiving evidence on affidavits;

(*d*) requisitioning any public record or copy thereof from any court or office;

(e) issuing commissions for the examination of witnesses or documents;

(f) any other matter which the Central Government may, by notification in the Official Gazette, specify.

(2) Every notification made under clause (f) of sub-section (1) shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the notification or both Houses agree that the notification should not be made, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be;

so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that notification.

**Commissioner and other officers and employees.**

6. (*1*) For the purpose of assisting it in discharging its functions under this Act, the Central Government may appoint an officer, to be known as the Commissioner for the welfare of the victims of the Bhopal gas leak disaster, and such other officers and employees to assist him as that Government may deem fit.

(*2*) The Commissioner shall discharge such functions as may be assigned to him by the Scheme.

(*3*) The Commissioner and such of the officers subordinate to him as may be authorised by the Central Government by

notification in the Official Gazette in this behalf may, for the discharge of their functions under the Scheme, exercise all or any of the powers which the Central Government may exercise under section 5.

(4) All officers and authorities of the Government shall act in aid of the Commissioner.

**Power to delegate.**

7. The Central Government may, by notification in the Official Gazette, delegate, subject to such conditions and limitations as may be specified in the notification, all or any of its powers under this Act (excepting the power under section 9 to frame a Scheme) to the Government of Madhya Pradesh or an officer of the Central Government not below the rank of a Joint Secretary to that Government or an officer of the Government of Madhya Pradesh not

below the rank of a Secretary to that Government.

**Limitation.**

8. (*1*) In computing, under the Limitation Act, 1963 or any other law for the time being in force, the period of limitation for the purpose of instituting a suit or other proceeding for the enforcement of a claim, any period after the date on which such claim is registered under, and in accordance with, the provisions of the Scheme shall be excluded.

(*2*) Nothing in sub-section (*1*) shall apply to any proceedings by way of appeal.

**Power to frame a Scheme.**

9. (*1*) The Central Government shall, for carrying into effect the purposes of this Act, frame by notification in the Official Gazette a Scheme as soon as may be after the commencement of this Act.

(2) In particular and without prejudice to the generality of the provisions of sub-section (1), a Scheme may provide for all or any of the following matters, namely:--

(a) the registration of the claims under the Scheme and all matters connected with such registration;

(b) the processing of the claims for securing their enforcement and matters connected therewith;

(c) the maintenance of records and registers in respect of the claims;

(d) the creation of a fund for meeting expenses in connection with the administration of the Scheme and of the provisions of this Act;

(e) the amounts which the Central Government may, after due appropriation made by Parliament by law in that behalf, credit

to the fund referred to in clause (*d*) and any other amounts which may be credited to such fund;

(*f*) the utilisation, by way of disbursal (including apportionment) or otherwise, of any amounts received in satisfaction of the claims;

(*g*) the officer (being a judicial officer of a rank not lower than that of a District Judge) who may make such disbursal or apportionment in the event of a dispute;

(*h*) the maintenance and audit of accounts with respect to the amounts referred to in clauses (*e*) and (*f*);

(*i*) the functions of the Commissioner and other officers and employees appointed under section 6.

(*3*) Every Scheme framed under sub-section (*1*) shall be laid, as soon as may be after it is framed, before each House of

Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the Scheme or both Houses agree that the Scheme should not be framed, the Scheme shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that Scheme.

**Removal of doubts.**

10. For the removal of doubts, it is hereby declared that--

(*a*) any sums paid by the Government to a claimant otherwise than by

way of disbursal of the compensation or damages received as a result of the adjudication or settlement of his claim by a court or other authority, shall be deemed to be without prejudice to the adjudication or settlement by such court or other authority of his claim to receive compensation or damages in satisfaction of his claim and shall not be taken into account by such court or other authority in determining the amount of compensation or damages to which he may be entitled in satisfaction of his claim;

(*b*) in disbursing under the Scheme the amount received by way of compensation or damages in satisfaction of a claim as a result of the adjudication or settlement of the claim by a court or other authority, deduction shall be made from such amount of the sums, if any, paid to the claimant by

the Government before the disbursal of such amount.

**Overriding effect.**

11. The provisions of this Act and of any Scheme framed thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or any instrument having effect by virtue of any enactment other than this Act.

**Repeal and saving.**

12. (*1*) The Bhopal Gas Leak Disaster (Processing of Claims) Ordinance, 1985, is hereby repealed.

(*2*) Notwithstanding such repeal, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under the corresponding provisions of this Act.

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to confer certain powers on the Central Government to secure that claims arising out of, or connected with, the Bhopal gas leak disaster are dealt with speedily, effectively, equitably and to the best advantage of the claimants and for matters incidental thereto.

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(As passed by the Houses of Parliament)